No. 4004

In the United States

Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

HENRY RITTER,
Plaintiff in Error,

—vs—

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Defendant in Error

GEORGE SPRINGMEYER,
United States Attorney.

CHAS. A. CANTWELL,
Assistant United States Attorney

No. 4004

In the United States Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

HENRY RITTER,
Plaintiff in Error,

—vs—

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Defendant in Error

As nearly as may be, defendant in error will follow the plan of the brief of plaintiff in error.

1.

Plaintiff in error asks a reversal upon the ground, first, that the indictment does not allege facts sufficient to show a violation of the National Prohibition Act in that it does not negative the

fact that liquor was not in the private dwelling of defendant, and was not for his or his family's use.

In the case of Herine against the United States 276 Federal, 806, this Circuit Court held sufficient a count that on a certain day in certain premises the defendant knowingly, wilfully and unlawfully, and in violation of the National Prohibition Act maintained a common nusiance in keeping intoxicating liquor fit for use for beverage purposes.

In the Herine case the count was for a common nuisance; in the case at bar the count complained of was for possession. If, in the common nusiance count, it is unnecessary to negative the fact that liquor was in a private dwelling or was for family use, it should not be necessary in a possession count.

In Young vs. United States 272 Fed. 967, this Circuit Court held good an indictment that defendants at a stated time and place in violation of the National Prohibition Act, maintained a common nusiance by unlawfully, wilfully and knowingly selling and keeping for sale for beverage purposes intoxicating liquor, to-wit: whiskey.

In Hensberg vs. United States, 288 Fed. 371, the Court held good an indictment that "defendant unlawfully, and wilfully, and in violation of the National Prohibition Act, sold intoxicating liquor, to-wit: one-half pint of whiskey, contrary to the form of the statute in such case made and provided".

Section 32 of Title II of the National Prohibition Act provides:

> "It shall not be necessary in any affidavit, information or indictment to give the name of the purchaser, or include in the affidavit negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

The following cases bear out the cases from which quotations are given:

Rulovich vs. U. S. 286 Fed. 315, x
Rudner vs. U. S. 281 Fed. 516,
Davis vs. U. S. 274 U. S. 928,
U. S. vs. Simmons 96 U. S. 360, 24 L. Ed. 819.

Finally, it is the general rule that following the language of the statute is sufficient if the accused is informed of the specific offense. See:

Garland vs. S. 232 U. S. 642, 56 L. Ed. 772.
Miller vs. U. S. 288 Fed. 816.
Oliver vs. U. S. 267 Fed. 544.

II.

As a second reason for reversal, plaintiff in error asserts that the Court erred in admitting evidence of Mr. Scott that during the arresting of the plaintiff in error and while the liquor was being seized, the witness informed officer Nash in the presence and hearing of plaintiff in error that the plaintiff in error had sold the drinks, and in admitting the testimony of officer Nash that Scott had told him in the presence and hearing of the plaintiff in error that Church sold the drinks and Ritter brought in the bottle.

It is believed that the evidence was properly admitted as an exception to the heresay rule, not

only as part of the res gestae, but also as an admission by assent. The statements were contemporaneous with the crime, and they were made in the presence and hearing of plaintiff in error, and were not denied.

> "Wharton defines res gestae as those circumstances which are the undesigned incidents of a particular ligitated act, and which are admissible when illustrative of such act * * * THEY MAY CONSIST OF SPEECHES OF ANYONE CONCERNED, WHETHER PARTICIPANT OR BYSTANDER * * * WHEN DECLARATIONS OR ACTS ACCOMPANY THE FACT IN CONTROVERSY AND TEND TO ILLUSTRATE OR EXPLAIN IT, THEY ARE TREATED, NOT AS HERESAY, BUT AS ORIGINAL EVIDENCE, IN OTHER WORDS, AS PART OF THE RES GESTAE * * * In the celebrated case in which Lord George Gordon was on trial for treason, the cries of the mob which accompanied the defendant during the acts complained of were received for the purpose of showing that his intentions were unlawful and treasonable." Jones on Evidence, Sec. 344, and citations.
>
> "If the declaration or act forms a part of the res gestae, it is admissable on grounds elsewhere discussed, not only as an admission affecting the declarant but as substantive evidence." Jones Sec. 254.
>
> "The rule allowing the silence of a person to be taken as an implied admission of truth of allegations uttered in his presence applies in criminal as well as in civil cases." Jones on Evidence, Sec. 290, citing cases.
>
> "As some of the cases already cited illus-

trate, admissions may sometimes be implied from the mere silence of a party * * * * IT APPLIES TO CERTAIN DECLARATIONS OF A THIRD PERSON ADDRESSED TO A PARTY AND NOT DENIED * * * * * Generally, the cases in which the party is held to be affected by his silence will be found to be cases where statements were made of his own actions or his own liabilities, and not where he had no concern in law and no right to reply * * * IF HE IS SILENT WHEN HE OUGHT TO HAVE DENIED THE PRESUMPTION OF ACQUIESCENCE ARISES." Jones on Evidence, Sec. 289, and citations.

"When by a party's silence an assent is given to the asserton of a third person, that assent is thereby adopted by the party and therefore may be used against him as his own statement and admission." Wigmore, 2nd Ed. Sec. 1052, citing cases.

"By way of specific rule carrying out the principle already examined it is sometimes said that the proponent of the evidence must say not merely that the party was present when the remark was made (presence of course implies proximity within a distance sufficient to permit hearing) but also that the party actually heard and understood what was said. But this seems too strict. The presence of a party may be assumed to indicate that he heard and understood. So also it is sometimes said that the proponent must show that the party had knowledge of the facts stated since otherwise he might have hesitated to contradict. This again is perhaps too strict, for a party's admission is receivable irrespective of his personal knowledge."

"Certain distinct principles need here to be

discriminated: Silence on the part of an accused person has sometimes a circumstantial significance, not by way of assent to a third person's statement, but as indicative of a consciousness of guilt."

"The failure to protest one's innocence on being arrested for a crime leads to the queston whether the fact of such protestaton may be shown to repel in advance the inference that might otherwise have been made." Wigmore Sec. 284, P. 584, and cases cited.

"BUT UNDER THE PRESENT EXCEPTION THAT NERVOUS EXCITEMENT WHICH RENDERS AN UTTERANCE ADMISSIBLE MAY EXIST EQUALLY FOR A MERE BYSTANDER AS WELL AS FOR THE INJURED OR INJURING PERSON, AND THEREFORE THE UTTERANCES OF EITHER CONCERNING WHAT THEY OBSERVED ARE EQUALLY ADMISSABLE."

"Fortunately there has been little inclination towards the error of fixing upon the present exception the inappropriate limitation of the verbal act doctrine. In a few courts the declarations of a mere bystander have been excluded. But in the greater number no such discrimination is made, assuming that the bystander's declarations relate only to that which has come under his observation." Wigmore Sec 1766, and cases cited.

Among pertinent cases, the following may be referred to:

State vs. Desroches, 12 So., 250. (Utterance of a bystander during a robbery identifying the defendant admitted.)

State vs. Duncan, 22 S. W., 699. (Bystander to an arresting officer, "There is the man that did it", admitted.)

State vs. Carraway, 107 S. E. 142. (Bystander's exclamation admitted.)

Amer. Mfg. Co. vs. Bigelow, 188 Fed. 34. (Statement of plaintiff's agent immediately after accident in answer to plaintiff's statement that the act had caused her injuries, "Well, it is too late now", admitted within the principle of res gestae.)

Sorrensen vs. U. S. 168 Fed. 785 at 792. (Statement in presence of defendant admitted upon showing that defendant heard it and assented to it by silence.)

III.

As a third and final ground for reversal, plainaiff in error argues that the trial court erred in refusing to give plaintiff in error's requested instruction with reference to decoys. Plaintiff in error says the instruction was taken bodily from the Peterson case decided by this Court in 255 Fed. 433. The statement is not entirely accurate in that in the requested instruction by plaintiff in error, after the word "importunities" (line 16 page 35 transcript of record) there were omittd the words "FALSE STATEMENTS", while after the word "liquor" in line 18 there were omitted the words, "ADMITTEDLY FOR THE PURPOSE OF ENTRAPING HER INTO THE COMMISSION OF THE OFFENSE". The words "false statements" and "admittedly for the purpose of entrapping her into the commission of the offense" were included in the Peterson requested instruction.

Also, there was entirely omitted in the instant case the 7th requested instruction which the Court

in the Peterson case held should have been given with the sixth instruction. In this seventh instruction there were specificially included the folowing:

> "Under the statements that the last two named persons were friends of Rose, WHICH STATEMENTS WERE WILFULLY FALSE, AND MADE FOR THE PURPOSE OF DECEIVING AND INVEIGLING THE DEFENDANT INTO A VIOLATION OF THE LAW and that yielding to the importunities the defendant did procure from her private source of liquor the three bottles testified to by officers Hand and Geris, and you further believe that defendant without such solicitation and importunities would not have violated the law, then it is your duty to acquit the defendant for the reason heretofore stated, that the Federal Courts do not uphold convictions for offenses committed under the instigation of Government agents."

At the outset, it is desired to point out that the Peterson case is admittedly sound and that the criticism by the trial Court in the instant case, so elaborately referred to by plaintiff in error, was not of that decision but of the applicability of plaintiff in error's requested instruction.

The Peterson case did not involve the National Prohibition Act, but merely a violation of the Selective Draft Act, which made it unlawful to sell intoxicants to soldiers during the war; a matter which is of vital importance in the question of whether plaintiff in error's requested instruction was properly refused. In the Peterson case it was

unlawful to sell intoxicants to soldiers, but it was not unlawful to possess intoxicating liquor. But at the time plaintiff in error was arrested, it was unlawful to possess corn whiskey as he did. The instant case may further be distinguished from the Peterson case in the following important particulars:

1. In the Peterson case the scheme of selling intoxicants originated with the officers, for it was not unlawful for Peterson to possess intoxicants, it simply being unlawful for her to sell to soldiers, and the officers urged her from six o'clock until nine o'clock to make the sale before she yielded; in the Ritter case the scheme did not originate with the officers, for the defendant had the liquor in his possession unlawfully, it being corn-whiskey which was manufactured subsequent to the passage of the National Prohibition Act, (Transcript of Record, page 20) and the officers on one occasion only, and then only for a short time, did anything in the way of begging him to give them liquor, while on three other occasions the sales by plaintiff in error Ritter were made without any solicitation by officers, and at least two of such alleged sales in fact were not made to officers at all. Under such circumstances, can it be said that the Peterson instruction necessarily apples?

2. In the Peterson case false representations were made to the defendants by the officers and detectives. But in the case at bar the arresting officers made no false statements. This is made clear by the fact that plaintiff in error Ritter omitted

from his requested instructions the statements which were inserted in the Peterson instructions, to which attention has already been called. Those statements are, "and false statements", and "admittedly for the purpose of entrapping her into the commission of the offense", and "under the statements that the last two named persons were frends of Rose which statements were wilfully false and made for the purpose of deceiving and inveigling the defendant into a violation of the law".

The situation in the principal case is precisely as in the case of Lucadamo vs. United States, 280 Fed. 653 at 657, where the Court said, "So where a scheme does not originate with a defendant, and he is lured into the conspiracy by an officer of the law he cannot be held for the offense, for in the contemplation of law no crime has been committed, BUT THE EVIDENCE HERE INDICATES THAT THE GOVERNMENT AGENTS SUSPECTED OR KNEW THAT THE DEFENDANTS BELOW WERE TRAFFICING IN DRUGS, AND THE GOVERNMENT AGENTS BARGAINED WITH THEM FOR THE SALE OF SUCH DRUGS. THIS THE DEFENDANT BELOW WAS PERFECTLY WILLING TO DO FOR A FAIR PROFIT. THEY HAD THE DRUGS OR KNEW WHERE TO GET THEM, AND WANTED TO SELL THEM. NO REPRESENTATIONS WERE MADE TO THEM OF ANY KIND. THEY TREATED THE OFFICERS OF THE LAW AS IF THEY WERE BUT ORDINARY PURCHASERS. UNDER THESE

CIRCUMSTANCES, THEY CANNOT BE HEARD TO COMPLAIN OF ENTRAPMENT, AND ESCAPE FROM THEIR UNLAWFUL INTENT TO VIOLATE THE LAW."

3. In the Peterson case there was only one sale on one particular occasion, but in the principal case there were two or three sales on May 8, 1923, and one sale on May 10, 1923.

As heretofore pointed out, on only one of three or more sales was there any solicitation by officers, and on at least two of the sales the purchasers were private individuals not connected in any way with the officers.

The requested instruction of plaintiff in error, however, applies to all sales, for it expressly asserts, "the defendant Ritter claims that he was entrapped into selling the liquor through the instigation of prohibition officers", and "you are instructed that if you believe from the evidence that defendant was induced by the importunities of the Government agent or agents to violate the law * * * * that the defendant Ritter was induced to sell liquor, and that defendant Ritter would not otherwise have violated the law, then you should return a verdict of not guilty".

The first sale upon which there was evidence was at 3:35 o'clock P. M. May 8, 1922, to officers Scott and DuBois, on which occasion plaintiff in error Ritter claims he was lured or persuaded to sell by the statements of the officers that they were very cold. (Transcript p. 58, 61, 82). The second sale was at 4:20 P M. May 8, 1922, after

the defendants had returned from a trip to a near-by place. Plaintiff in error does not claim that on this occasion he was lured into doing anything wrong. (Transcript p. 59, 61, 83).

The officers testified that on the second occasion, that is at 4:20 P. M. May 8, 1922, there were a man and a woman in the bar-room, drinking brown liquid from whiskey glasses at the bar. (Transcript p. 51-84). Might not the jury have found that a sale? The last occasion of a sale (this may be called either the third or fourth sale) was on May 10, 1922, when plaintiff in error served whiskey to witnesses Grier, Swearingen and Burris—all private citizens—in whiskey glasses, at the bar in the bar-room, and someone placed some money (from $2.50 to $5.00, according to witnesses) on the bar, which was there a few minutes later when plaintiff in error was arrested by officer Scott, who entered while the others were drinking and was himself served with whiskey by plaintiff in error at the bar before the arrest. There was no claim that defendant was lured or enticed into serving the liquor to Grier Swearingen or Burris. (Transcript p. 51, 52, 59, 60, 62, 63, 64, 65, 71, 73, 76).

The indictment alleges (Transcript p.p. 2 and 3) that on or about the 8th day of May, 1922, plaintiff in error did unlawfully, wilfully and knowingly sell intoxicating liquor containing one-half of one per cent., or more, of alcohol by volume, fit for use for beverage purposes. The names of the purchasers are not given, and it is clear that the

evidence as to all four sales was proper, and it was admitted without objection or exception.

4. Under the requested instruction the jury would have been bound to find a verdict of not guilty if on one occasion there was an improper decoy, regardless of whether on the other occasions there was no decoy. Plaintiff in error should have segregated his instructions to include separate facts or included all the facts in the requested instruction instead of selecting only those facts having to do with the decoy.

> "Instructions which do not properly hypothesize all the facts should be refused." Blashfield p. 76.
>
> "It is improper to give an instruction dealing with but one fact in evidence, or to give instructions ignoring material evidence, issues and theories." Blashfield p.26.
>
> "Where the right of action or defense rests upon several questions of fact an instruction making the question turn upon the finding as to one point and ignoring the others is erroneous and may be refused. A refusal of instructions defective in this regard is of course proper. And error can in no case be predicated on such refusal." Blashfield p. 219-220.
>
> "It is also the rule that instructions may not ignore material evidence or be drawn so as to exclude such evidence from the consideration of the jury." Blashfield p. 226, citing:
>
> Rio Grande Western Railway Company vs. Leak, 163, U. S. 280, 41 L. Ed. 160.
>
> Allison vs. U S. 160 U. S. 203, 40 L. Ed. 395.
>
> See also: Zoline, Federal Criminal Law & Procedure, Sec. 437.
>
> 16 Corpus Juris Sec. 2356, 2358, 2502.

5. In the Peterson case the trial Court did not

instruct the jury correctly and did not properly cover the matter of entrapment. The Circuit Court expressly called attention to the fact that in the trial Court's instructions it was said, "There is raised only one real question of law in the case", and that, "the difficulty wth the learned Judge of the trial Court below was that he treated the question as to whether or not the defendant was expected to commit the crime by the officers as a question of law, and not of fact", and "it is obvious that the case did not present any question of law for the jury to determine, and only one controverted question of fact, that is to say: whether or not the defendant was expected by the officers to sell the beer". BUT IN THE CASE AT BAR THE TRIAL COURT DID NOT REPEAT THE MISTAKE OF THE PETERSON CASE BY SAYING THERE IS RAISED ONLY ONE QUESTION OF LAW IN THE CASE, OR ANYTHING TO THAT EFFECT, AND HE DID PROPERLY INSTRUCT THE JURY AS TO ENTRAPMENT. The instructons of the Court as to entrapment are as follows:

> "There has been considerable said about an entrapment. Much of what has been said is worthy of consideration. This great Government of ours is not engaged in the business of manufacturing criminals; it has enough to do to prevent crime. It is not expected to induce men to commit crime in order that they may be convicted and punished. It is unfortunate, however, that men do commit crime. It is unfortunate that this law is violated as frequently as it is The fact that law is violated

renders it necessary to have courts and juries, and to have officers and prohibition enforcement officers. The fact that a man is employed by the Government to suppress the traffic in intoxicating liquor is not a fact from which you are entitled to conclude that he cannot be mistaken, or, on the other hand, that he is unworthy of belief. You are to weigh his testimony just as you do the testimony of every other witness. If he seems to be swayed by improper motives, you are to consider such motives. You are entitled to remember with reference to the defendants themselves, that they are deeply interested in this case, and its outcome.

"As I have said before, the Government is not engaged in manufacturing criminals, but it does become necessary for detectives, and the prohibition officers, to match their wits against the wits of the man who is deliberately, persistently, or frequently violating the law, or who has violated the law. Crime is not committed on the housetops, nor in the streets, as a rule; it is committed under such circumstances that the officers are not supposed to see it, and the public is not expected to witness it. But the decoy and the entrapment must be fair. I will illustrate this by a case which occurred in Montana some years ago. An officer of the Government induced an Indian, who looked very much like a Mexican, to go into a saloon and purchase whiskey. The whiskey was sold, the saloon-keeper arrested, indicted tried and convicted. The Court held that it was not a fair decoy, because the saloon-keeper did not know he was violating the law when he sold the whiskey to the Indian. It was a trap. The Indian appeared to be a Mexican, and the saloon-keeper had no reason

to believe he was violating the law when he sod the whiskey to the Indian.

"There is another case known as the Woo Wai case, which has been cited frequently. In that case a Chinaman (74) of some standing in Southern California was approached by a Government officer who told him there was a great deal of money to be made in smuggling Chinamen across the international line from Mexico; the officer introduced the Chinaman to some of the revenue officers and explained the manner in which it could be done; Woo Wai said that will be violating the law and the officer said to him 'I will be there to assist you, these officers will be there, and you will not be arrested'. Thus they induced the Chinaman to engage in the business of smuggling Chinese across the line. He was promptly arrested the first time he committed an offense of that kind. He was tried, but the Court held a conviction under those circumstances could not stand.

"The idea of the law is, however, that a man who is engaged in unlawful business may have an opportunity and the Government officers may afford him an opportunity to commit a crime. If a Government officer goes into a place, asks for a drink of whiskey and it is given to him at his solicitation, convictions based on such evidence are frequently sustained.

"These are merely illustrations. You are to remember that is is for you to determine from the evidence, and after a consideration of all of it, whether this was a fair decoy or not. And in considering whether it was fair, you are to consider all the surroundings; you will consider the fact that it occurred in a soft-drink place, you will consider the fact

that the liquor was served in a certain kind of glasses; that a bottle was brought from a place outside the room outside the soft-drink place; you will consider the quantity of whiskey found there subsequently or found on the 10th of May. You will consider the fact also that was a funnel with the bottles; and you will consider not only the whiskey found in those bottles, but you will consider and give such effect to the other testimony with reference to other bottles and jugs of the same kind which were found there as you think proper."

In the case of Billingsley vs. U. S. 274 Fed. 86-89, a National Prohibition Act case, the Court expressly approved an entrapment instruction similar to the one given by the trial Court in the instant case.

An elementary proposition of law is that it is unnecessary to give a requested instruction when the subject matter has already been covered properly. See:

16 Corpus Juris p. 1063, and citations, Blashfield p. 426-431-437.

Manchard vs. Griffon 140 U. S. 516-535, L. Ed. 527.

Ind. etc. Ry. vs. Horst 93 U. S. 291, 23 L. Ed. 898.

Denver, etc. Ry. vs. Roller, 100 Fed. 738.

Bennett vs. U. S. 227 U. S. 333.

Holt vs. U. S. 218 U. S. 245.

It is almost needless to add that there is nothin the suggeston of the plantiff in error that there should be a reversal because the trial judge's statements were made in the presence of the jury. The rule in federal courts is that the trial judge may

sum up the facts and express his opinion on them. De Jianne vs. United States, 282 Fed. 737. See also Zoline, Federal Criminal Law & Procedure, Sec. 434.

It is earnestly urged that on not one of the grounds argued is plaintiff in error entitled to a new trial.

Respectfully submitted,

GEORGE SPRINGMEYER,
United States Attorney.

CHAS. A. CANTWELL,
Assistant United States Attorney.